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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1985

_____ o _____

IRMGARD MARIA HARDIE,

Petitioner,

v.

PHILIP WILLIAM HARDIE,

Respondent.

_____ o _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Irmgard Maria Hardie
Petitioner Pro Se
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Columbus, Ohio 43232
(614) 863-9485

QUESTIONS PRESENTED

A. Was the Court of Appeals correct to affirm the District Court's decision that 1) it was precluded from ruling on any of Petitioner's claims previously addressed by the Alaska state courts; 2) it lacked jurisdiction over Petitioner's domestic relations claims; 3) Petitioner's tort, civil rights and contract claims were time-barred?

B. Was the Court of Appeals correct to affirm the District Court's preclusion of the second action pursuant to 28 USC 1738 Full Faith and Credit, when the first action (state) was fraught with violations of mandated federal procedural requirements and deprived Petitioner of due process of law and the rights of access to the state courts to be heard on changed circumstances? EX. App. "E".

C. Whether a District Court is correct to preclude an ex-wife from suing an

ex-husband in a prima facie breach of contract and personal injury matter on diversity when the accrual of the breaches and personal injuries are discovered post-divorce? Is divorce the finality of domestic relations?

D. Whether divorced persons are a special class of citizens, deprived of their rights to sue each other for acts committed post-divorce? Can a former spouse commit torts and civil rights offenses, post-divorce, and remain immune from suit by the victimized ex-spouse who is precluded to sue on diversity in federal courts because of ancient history of a divorce?

E. Whether a District Judge, without a trial, can assume that claims have been decided in the state courts when in fact these claims did not exist at time of

state court action, and therefore have never been heard or decided?

F. Was the Court of Appeals correct to affirm the District Court's Summary Judgment in favor of Respondent pursuant to FRCP 56 and FRCP 12(b)(1) as a matter of law when there were genuine material issues of fact in dispute and procedural and substantive defects prevalent in the District Court action, a fortiori, prejudicial interpretation of Alaska Statutes AS 09.25.010 (Statute of Frauds), AS 09.10.040 (Judgments - Statute of Limitations 10 Years), AS 09.10.050 (Breach of Contract - Accrual Theory) and AS 09.10.070 (Personal Injury and Tort - Accrual Theory), in Respondent's favor?

G. Was the Court of Appeals correct to disregard Petitioner's questions of Constitutionality of AS 25.24.100

QUESTIONS PRESENTED (cont'd.)

(Residency requirements for military personnel for purpose of Alaska divorce) and AS 25.24.160 (Military pensions indivisable upon divorce) and failed to inquire with the Attorney General of Alaska as mandated by 28 USC 2403(b)?

The Constitutionality of AS 25.24.100 is drawn into question because it grants life-time residency rights to military personnel for purpose of divorce proceedings in Alaska after a one-year military service tour in that state, whether or not the military person is present in Alaska after his military tour.

The Constitutionality of AS 25.24.160 is drawn into question because it treats military pensions as "continued pay" and not divisible as property upon divorce, and therefore it appears discrim-

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IRMGARD MARIA HARDIE,

Petitioner,

v.

PHILIP WILLIAM HARDIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Irmgard Maria Hardie, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 4, 1986.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the District Court's Summary Judgment on February 4, 1986. A copy of the Memorandum is attached as Appendix B.

The Court denied Petitioner's petition for rehearing en banc on May 9, 1986. A copy of the order is attached as Appendix C.

JURISDICTION

Invoking federal jurisdiction pursuant to 28 USC 1332, the Petitioner brought this suit in the District Court of Alaska (Anchorage), on June 14, 1983. On July 18, 1984, the District Court rendered Summary Judgment in favor of Respondent and denied Petitioner remedy and relief. The Memorandum Decision and Order and Judgment are attached as Appendix D.

The Court of Appeals for the Ninth Circuit on Petitioner's appeal had

jurisdiction pursuant to 28 USC 1291 and 28 USC 1294(1). The Court of Appeals affirmed the District Court's Summary Judgment on February 4, 1986, and denied Petitioner's petition for rehearing en banc on May 9, 1986.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 USC 1254(1).

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STATEMENT OF THE CASE

A. PROCEDURAL AND SUBSTANTIVE DEFECTS IN DISTRICT COURT ACTION

1. The District Judge failed to give Notice of Intention to pro se Petitioner

(plaintiff), contrary to the criterion in the Ninth and most other Circuits, prior to rendering Summary Judgment.

2. The District Judge failed to grant Petitioner leave to amend her complaint pursuant to FRCP 15(a) DCR 34.[1]

3. The District Judge failed to enforce its initial order, compelling the Respondent to submit all the state court pleadings and documents requested by the Court. DCR 35.

4. The District Judge failed to enforce its initial order, compelling the Respondent to answer 120 interrogatories. (Magistrate) DCR 26.

5. The District Court rendered Summary Judgment without Respondent's answers to admissions, FRCP 56(e), App. A-12, and without Respondent submitting certified state court documents, DCR 40,

---

[1]DCR = District Court Record.

FRCP 56(e), App. A-12, and without Respondent actually filing a Motion for Summary Judgment, or submitting a statement that there are no genuine material issues of fact in dispute.

6. The District Judge rendered Summary Judgment without requesting pro se Petitioner to submit additional affidavits, and thus, without enlargement of the record and without taking any other action as justice would demand. FRCP 56 (f), App. A-13.

7. The District Judge rendered Summary Judgment pursuant to FRCP 12(b)(1) App. A-10, "Want of Subject Matter Jurisdiction," when first it assumed jurisdiction by ordering the Respondent to produce all state court documents, Petitioner's pleadings and contentions, orders, judgments and decrees, inter alia. DCR 35.

8. The District Judge in its Decision Memorandum omitted to consider or rule on

Alaska Statute AS 09.10.040 (Judgments, Statute of Limitations - 10 Years), App. A-19, as it concerns in praesenti $90,000.00 alimony arrearages, pursuant to two original judgments and decrees from two diverse states, Florida and Alaska, and the District Judge failed to invoke the Federal Statute 28 USC 1738, App. A-7, as it concerns the Florida Judgment FLA 71 3131 C (AS 71-801), Hardie v. Hardie, which was initially recognized by Alaska. DCR 40, EX. I-A (FLA Judgment and Decree).

9. The District Judge rendered Summary Judgment without regard to Petitioner's allegations in her proposed amended complaint as to Respondent's extrinsic fraud and fraud upon the state courts by securing his Alaska divorce and pendant subsequent state court proceedings. DCR 34.

10. In the consideration of Petitioner's state of health and also when she

discovered her severe injuries, by rendering summary Judgment and expressed in its Opinion, the District Judge acted as proponent and expert witness without a hearing and without the testimony of expert witnesses.

11. The Summary Judgment denied Petitioner a trial and she was denied to plead the equitable estoppel versus the Respondent's pleading the statute of limitations as a defense. No statute of limitations had run at the time of filing the complaint on June 14, 1983 as to Petitioner's breach of contract, tort and personal injury claims. The state court record would reveal that the state adjudicatory proceedings were in violation of federal procedural standards and failed to comport with these standards, resulting in unconscionable state court orders and rulings in favor of the doctor. DCR 40. Restatement of Judgments, Second,

Par. 86, Comment (e), Par. 26(1)(c)(d)(e), App. A-14-16.

12. No preclusion applied because of the Equal Protection Clause of the Fourteenth Amendment. The diverse Alaska Supreme Court decisions in Hardie v. Hardie, AS 78-3345, AS 82-6973, AS 83-7788, were in contradiction to Alaska Supreme Court criteria of Merrill v. Merrill, 368 P.2d 546 (Alaska 1961); Schoning v. Schoning, 550 P.2d 373 (Alaska 1976); and Hinchey v. Hinchey, 625 P.2d 297 (1981).

13. The District Judge rendered Summary Judgment in favor of Respondent despite submitted medical attestations of Petitioner's serious injuries and damages, discovered in April 1983, the result of Respondent's malicious, tortious acts, post-divorce. DCR 31, EX's III, IV Excerpt, Appellant's Brief C.A.

B. STRICTLY PROCEDURAL DEFECTS IN DISTRICT COURT ACTION

1. The District Judge failed to issue scheduling order within 120 days as mandated by FRCP 16.

2. The US Magistrate Hon. Roberts (Alaska), on November 29, 1983, ordered the Respondent to answer within thirty (30) days, Petitioner's 120 interrogatories. Respondent ignored the order and Petitioner filed a Motion to Compel Discovery. The Motion was not ruled upon. DCR 26, DCR 28.

3. On December 2, 1983, Respondent filed a "Motion to Dismiss the Complaint." DCR 27. On December 8, 1983, Petitioner filed a Memorandum in Contra to Motion to Dismiss" and a "Motion for Leave to Amend the Complaint." DCR 31, 32. Though the District Court acknowledged receipt of Petitioner's motions, both were declared lost by the judge's law clerk, DeBodo, on

or about January 9, 1984. Respondent's "Conditional Non-Opposition to Motion to File Amended Complaint" was also declared lost by the law clerk. DCR 30. By request of the District Court, all pleadings had to be re-filed.

4. On January 31, 1984, Petitioner filed a proposed Amended Complaint with a second "Motion for Leave to Amend the Complaint." The motion was not ruled upon. DCR 34.

5. On February 3, 1984, the District Judge ordered Respondent to file with the Court "all the plaintiff's (Petitioner) pleadings and contentions submitted to the Alaska state courts regarding the issues and events involved in this litigation and all copies of all decrees and judgments issued by the Alaska state courts." DCR 35.

6. On April 26, 1984, Respondent filed "Supplemental Memorandum in Support

of Motion to Dismiss the Complaint" with a few state court documents, but he omitted to produce the contents of a three-feet thick state court file containing all of the Petitioner's pleadings and contentions, orders, judgments, decrees, inter alia, as ordered by the District Judge. DCR 35. Respondent pleaded "illegibility of many, if not most of the state court documents" and stated in his Memorandum DCR 40, page 4, defiant of the District Court Order DCR 35, that he "made no effort to include each and every motion or paper filed by Petitioner with the states court at various times," and a fortiori, "that many of (sic) not most of the motions were not ruled upon by the state court for various reasons." See FRCP 56(g). Here are manifested Respondent's defiance to produce the state court evidence as ordered by the District Judge and Respondent's own statements of the

procedural inequities in the state court proceedings. Respondent's deliberate withholding of the state court documents should have given rise to further order by the District Judge. DCR 40.

7. On May 5, 1984, Petitioner filed a "Memorandum Contra to Supplemental Memorandum of Motion to Dismiss the Complaint" with Affidavit, stating the irregularities in the state court proceedings and the inadequacies of Respondent's submissions with his absolute thwarting of the production of all the court ordered state court documents. DCR 42.

8. On July 18, 1984, without giving Notice of Intention to pro se litigant-petitioner, contrary to the standing Ninth Circuit and most other Circuit Court's criterion, the District Judge entered a Summary Judgment in favor of Respondent. DCR 46, 47.

9. Prior to Summary Judgment being rendered, there were no answers to interrogatories, no admissions, no depositions, all of which are material facts. There was no full discovery. Summary Judgment was rendered by ambush and denied Petitioner a trial by jury and remedy and relief. There were sufficient genuine issues of material facts at issue for trial, a fortiori, approximately $90,000.00 alimony arrears in dispute, and damages and injuries incurred by Petitioner by Respondent's malicious, tortious acts, post-divorce, "until the present." In disregard for FRCP 56(f), the District Judge took no action to enlarge the record or request Petitioner to submit additional affidavits, and thus manifest injustice was not prevented.

10. The Court of Appeals sustained the District Court's departure from the accepted and usual course of judicial

procedure and Petitioner calls for the exercise of this Court's power of supervision and review. Supreme Court Rule 17, Part V, 28 USC 2072, App. A-8.

C. STRICTLY SUBSTANTIVE DEFECTS IN DISTRICT COURT ACTION

1. "Injury-in-Fact" and Standing for Art. III Action

On June 14, 1983, Petitioner filed a prima facie complaint for Respondent's diverse breaches of contracts and malicious tortious conduct and acts, post-divorce, causing Petitioner severe injuries and damages, the injuries discovered in April 1983. DCR 1, EX III. Petitioner had made out a justicable case and controversy within the meaning of Art. III, Sec. 2(1), of the United States Constitution. She demonstrated her constitutional standing by actually sustained injuries and damages, traceable to Respondent's cruel acts and there could have been

redress by a favorable decision. Gladstone Realtors v. Village of Bellwood, 441 US 91, 99 (1979); Simon v. Eastern Kentucky Welfare Rights Org., 426 US 26, 38, 41 (1976); Valley Forge Christian College v. American United for Sep. of Church and State, Inc., 454 US 464, 472 (1982). The District Court invoked 28 USC 1738, App. A-7, utilizing an Alaska consent decree, a default-uncontested divorce, for preclusion, though petitioner showed "Injury-in-Fact" and deprivation of life, liberty and property by undue process of law in the state courts. Valley Force College, supra at 473.

2. Issues and Claims of Second Action Not Identical To First Action

None of the issues and claims of damages and injuries brought forth in the second action are identical to the former and were never actually litigated by the parties, or determined. The requirement

of actual litigation, necessary for preclusion in this case is missing. Kasper Wire Works, Inc. v. Leco Engineering and Machine, 575 F.2d 530 (5th Cir. 1978). Williams v. Bennett, 689 F.2d 1370, 1381 (11th Cir. 1982). The District Court erred to preclude Petitioner from litigating her claims for injuries and damages. The state court proceedings failed to comport with even a scintilla of the standards of mandated federal procedural requirements and the diverse judgments and orders in Respondent's favor should not be entitled to recognition because of obstruction of justice and undue process of law. Hardie v. Hardie, AS 71-441 (state), Hardie, William Bruce, Minor, AS 73-152 (state): Restatement of Judgments, Par. 36, Comment (e), Par. 26(1)(d)(f) 1982. XIV, Amendment, Constitution. Brinkerhoff-Faris Co. v. Hill, 281 US 673, 680 (1930), Robinson v. Arivoshi, 441 F.S. 559, at 580

(D.C. Hawaii, 1977). Petitioner's rights were destroyed without due process having been afforded her by the state courts. The federal guaranty of due process extends to state action through its judicial branch of government. Brinkerhoff-Faris Co., supra, at 673, 680. The diverse adjudications in the state courts failed to meet these standards and were therefore not subject to preclusion in the federal action. State remedy and relief were foreclosed to Petitioner. Hardie v. Hardie, Supreme Court Alaska, AS 78-3345, 82-6673, 83-7788. Parratt v. Taylor, 451 US 527, 1981.

3. Jury Trial Denied (VII, Amendment)

The District court had the power and authority to grant Petitioner relief by trial to jury, but Petitioner, as out of state litigant, alleges invidious discrimination against her by Alaska authorities, in collusion with Respondent, because of

her ethnic German origin. Oyama v. California, 332 US 633 (1948); Tumey v. Ohio, 273 US 510 (1927), App. E 1-2 Petitioner was denied to be heard. Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962); Gutensohn v. Kansas City Southern Ry. Co., 140 F.2d 950, 953 (8th Cir. 1944) note 4; Mullane v. Central Hanover Bank and Trust Co., 339 US 306 (1958); Fuentes v. Shevin, 407 US 67 (1972). Petitioner stated a valid claim for injuries and damages and was entitled to trial by Jury. VII, Amendment, Constitution. Substantial issues of fact precluded a ruling in Summary Judgment. Nat. Patent Dev. Corp. v. Am. Hosp. Supply, 616 F.S. 114 (D.C.N.Y. 1984); Daily Income Fund Inc. v. Fox, 464 US 523, 544 (1985).

Petitioner, though facing a life or death situation, and there were and are changed circumstances, was denied access to the Alaska courts, state and federal,

in violation of her Civil Rights. 42 USC 1985. Hudson v. Palmer, _____ US _____, 104 S.Ct. 3194, 3203 (1984). Considering Petitioner's circumstances, the District Court's conclusion was unreasonable. Haines v. Kerner, 404 US 519 (1972).

4. Equitable Rights Denied In District Court - Allegations Of Respondent's Fraud and Fraud Upon The State Courts Reason To Negate Preclusion

Petitioner sought the equitable protection of the Federal Court because the state courts of Alaska deprived her of life, liberty and property without due process of law, causing extraordinary hardships and damages. Art. III, Sec. 2 (1), App. A-1; Constitution, XIV Amendment, Sec. 1, 42 USC 1983, 1985. App. A-2. The District Court, by inappropriately granting Summary Judgment, declined the power and authority to delve into the underlying cause and inquire into Petitioner's allegations of Respondent's extrinsic fraud

and fraud upon the state courts when he secured the divorce, and during subsequent state court proceedings. Greene v. Greene, 2 Gray (Mass) 361, 61 Am., Dec. 1854; United States v. Throckmorton, 98 US 68 (1878) (61-71).

5. Constitutiona'ity of Alaska Statutes AS 25.24.100 and AS 25.24.160 In Question

In 1984, Petitioner discovered that the Alaska Statutes AS 25.24.100 (residency requirement for military personnel for purpose of facilitated divorce) and AS 25.24.160 (preferred treatment of military personnel upon divorce: military pension indivisible as property) are in question as to their constitutionality and that they are discriminatory against women and children in divorce actions. App. A-18. In her petition for rehearing en banc to the Court of Appeals on February 18, 1986, Petitioner attacked both statutes for their unconstitutionality, but

the Court of Appeals failed to certify the fact to the Attorney General of Alaska. 28 USC 2403(b). Verlinden B.V. v. Central Bank of Nigeria, 461 US 480 (1983) at 87, note 8. Because both Alaska statutes give preferential treatment to military personnel in a divorce, based on a one-year military service time as residency requirement, and because they are discriminatory to military wives, they are unreasonable, arbitrary and capricious. Nebbia v. New York, 291 US 502 (1934) at 525.

6. Petitioner's Breach of Contract Claims Do Not Fall Within Analogous State Statute of Frauds

In their respective opinions, both courts below overlooked Alaska Statute of Frauds AS 09.25.010, duly pleaded by Petitioner. Petitioner/Appellant's Brief C.A. of October 26, 1984, page 26. Petitioner's claims for Respondent's diverse

breaches of contracts in tort do not fall within the Alaska statute of frauds. An estate, generally, cannot be created within one year. App. A-19 and 19. Upon retirement from the U.S. military in 1970, respondent promised the Petitioner that he would "create an estate for Petitioner and the parties' son." He failed to keep this written promise. Petitioner/Appellant's Brief C.A., Excerpt DCR 31, EX I. Respondent made this promise solely to mislead and deceive Petitioner and cajole her by coercion and duress into an uncontested Alaska divorce on his terms. The small amount he was to pay pursuant to two original judgments from two diverse states, has become an alimony arrearage of $90,000. North American Trading and Transport Co. v. Byrne, 4 Alaska 26 (1910). AS 09.10. 050. App. A-20.

7. Alaska State Statute AS 09.10.040 Judgments - 10 Year Statute of Limitations

The Courts below, in their respective opinions, App. B and D, disregarded the Alaska Statute for Judgments AS 09. 10.040 (10 Year Statute of Limitations). Petitioner/Appellant's Brief of October 26, 1985, pp. 20, 25. The respondent, pursuant to two original judgments and decrees for alimony from two diverse states, would owe Petitioner $90,000.00 in alimony arrearages, accumulated by undue process of law procedures in the state courts. Sutton v. Leib, 342 US 407 (1952), note 14. By totally illegal state court procedures, the parties' son was used as a pawn in a custody dispute to relieve the Respondent to pay alimony, depriving Petitioner and the parties' son of the equal protection under the laws. DCR 40 EX's II-C, II-E, II-F. 42 USC 1983,

1985. No statute of limitations has run pursuant to the Alaska statute of judgments.

8. Alaska State Statute AS 09.10.070 Starts To Run At Time Of Accrual Of Tort (Invasion Of Person's Legal Rights)

The statute of limitations AS 09.10.070 (Statute of Torts and Personal Injury) App. A-20, started to run in April 1983 when Petitioner discovered her injuries and damages pursuant to Alaska Supreme Court criterion, the last element of the accrual doctrine. Greater Area Inc. v. Bockman, 657 P.2d 828 (Alaska 1982), at 830. Petitioner filed her complaint June 14, 1983, and since filing the complaint she incurred additional severe injuries because Respondent accelerated his malicious conduct, and by the delay of the federal action. Alaska Statute AS 09.10.070 is synonomous with the "accrual theory" of the "Zenith Doctrine." Zenith

Radio Corp. v. Hazeltine Research, Inc., 401 US 321 (1971). AS 09.10.070, App. A-20.

9. Particular Oppressive Facts Were Known To Courts Below And Demanded Equitable Remedy And Relief

The Petitioner is a partially blind and diabetic cancer victim (62), and exists by the absolute injustice endured, since the divorce, on a level that insults human dignity and is in contradiction to her former status in life. Petitioner supported one-half of Respondent's Army career with her funds (approximately $80,000 to $100,000). Respondent's malicious motives and intent to shed Petitioner and his obligations to her when she had cancer and when he retired from the US military services in 1970, caused the state court litigation which best is described as a dishonorable sham of justice miscarried. Respondent retired as a

Colonel. During the parties' marriage, he earned an additional decree in hospital administration. Since his retirement from the U.S. military in 1970 and hiding in Alaska, he works as a physician and earned fortunes while rendering Petitioner and the parties' son to the poverty level. He earns approximately $87,000 per anum and collects an annual military pension of approximately $35,000, but supported Petitioner and the parties' son with $3,500 per annum, on the average, since 1970. By the inequities in the state court proceedings and by the federal court's Summary Judgment in Respondent's favor, he could accumulate in his favor $90,000 in alimony and child support arrearages. XIV Amendment, Constitution. App. A-2. Restatement of Judgments, Par. 86, Comment (e), Par. 26(c)(d)(f), App. A-14-16. The state courts rendered both judgments in Petitioner's favor into

nullities in violation of Petitioner's Equitable Rights. The state court decisions in Respondent's favor enticed him to conduct a vicious war of attrition against Petitioner. Respondent's harrassments have the purpose to force Petitioner and the parties' son to leave the United States and live in a foreign country. Respondent's perfidious conduct exists "until the present." See, Petitioner/ Appellant's Brief C.A. October 26, 1984, Excerpt "Special Exhibits" "b", Letter by Respondent of June 30, 1977. Respondent endangers Petitioner's life and it is a continuous tortious act and of perpetual nature and no analogous state statute of limitations have started to run on the "continuous tort doctrine." Bethel v. Jendoco Constr. Co., 570 F.2d 1168 (3rd Cir. 1978); Ross v. United States, 574 F.S. 536 (S.D.N.Y. 1983). Austin v. Fulton Ins. Co., 444 P2d.

536 (Alaska 1968). Greater Area Inc. v. Bookman, 657 P.2d at 830, supra.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred To Affirm The District Court's Summary Judgment In Favor Of Respondent Pursuant To FRCP 56 (c)(d)(e)(f)(g) and FRCP 12(b)(1) Because of Procedural And Substantive Defects In The District Court Action.

The District Judge denied Petitioner leave to amend her complaint. Foman v. Davis, 371 US 178 (1962); Conley v. Gibson, 335 US 41 (1957); Poller v. Col. Broadcasting Co., 368 US 464 (1962); United States v. Diebold, 369 US 654 (1962). Summary Judgment was inappropriate in this particular case because there were genuine material issues in controversy and the movant was not entitled to prevail as a matter of law. FRCP 56. There is evidence, crucial to material

issues in the case, and full discovery should have been allowed before the trial judge ruled on a motion to dismiss and, without giving Notice of Intention to pro se Petitioner (plaintiff), sua sponte, rendered summary Judgment. Program Engineering v. Triangle Publications, 634 F.2d 1188 (9th Cir. 1980), note 9.

The complaint should not have been dismissed by Summary Judgment pursuant to FRCP 12(b)(1), App. A-10, when initially the District Judge ordered the Respondent to file all of Petitioner's state court pleadings, contentions, orders and judgments, because by his order the District Judge had assumed subject matter jurisdiction. As the Court in Black v. Payne, 591 F.2d 83-86, note 1 (9th Cir. 1979) held:

> "If the District Court dismisses an action after it had addressed the merits of the case to label the dismissal as one for lack of subject matter jurisdiction is improper."

The District Judge assumed the role of proponent and expert witness, deciding Petitioner's state of health by way of Summary Judgment after she suffered and discovered the injuries. As a conclusion, the Judge decided that Petitioner's injuries were not incurred by Respondent's conduct and acts. DCR 42. AS 09.10.070, App. A-20. The state of health, physical or mental, of a litigant is a material fact for the finder of the facts and so are motives and intent. Poller v. Col. Broadcasting Co., supra, at 18; Walker v. American Motorists Ins. Co., 629 F.2d 1163 (5th Cir. 1976). Steckl v. Motoral, Inc., 703 F.2d 392 (9th Cir. 1983). Mich. Law Rev., Vol. 20, p. 407, Goodrich, Herbert, 1920/1921.

The second action was not barred because the adjudications in the first action were plainly inconsistent with the fair and equitable implementation of a

statutory and constitutional scheme. Restatement Judgments, Second, Par. 26(1)(c)(d)(f) 1982. App. A-15. Stanley v. Missouri State Bd. of Law Ex's., 616 F.S. 142 (D.C.Mo. 1985); Regents of Univ. of Mich v. Ewing, _____ US _____, 106 S.Ct. 507, 511 (1985). Petitioner's privileges and immunities were grossly violated in the state courts, depriving her of her Fourteenth Amendment rights. These were no ordinary circumstances to bar Petitioner from litigating claims that could not be litigated in the first action. Allen v. McCurry, 449 US 90 (1980); Bottini v. Sadore Mgt. Corp., 764 F.2d 116 (2d Cir. 1985), note 3. Res Judicata and Collateral Estoppel did not apply.

Petitioner's prima facie case for Respondent's breaches of contracts, and tort, resulting in damages and severe injuries could not be brought within the

initial state court action because the injuries were discovered by Petitioner in April 1983 when she succumbed to Respondent's continuous, malicious, intentional conduct, post-divorce. AS 09.25.010, AS 09.10.050, AS 09.10.070. App. A-18, 20. McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir. 1985). DCR 31, EX's III, IV, Petitioner/Appellant's Brief to C.A. October 26, 1984. This Court in Allen v. McCurry, supra, held, and it was recognized, that procedural and constitutional defects in a state court judgment would undercut full faith and credit in the 42 USC 1983 context and the Court declared that such an exception to the dictates of sec. 1738 would be essentially the same as the important general limits on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair

opportunity to litigate the claim or issue decided by the first court. Id. 101 S.Ct. at 418, note 17. The state courts were locked for Petitioner since 1978. The state court proceedings, Hardie v. Hardie, AS 71-441, and Hardie, William Bruce, minor, AS 73-152, were unfair, biased and arrived at in procedurally deficient fashion. DCR 40. Appellant's/Petitioner's Brief C.A., October 26, 1984, Excerpt. Special Exhibits "e", Alaska Supreme Court decisions without Opinions. The first court in which a plaintiff brought the first action must have been willing and able to consider the theory advanced in the second action. Bottini v. Sadore Corp., supra, Id. note 3.

Both Courts below in their respective opinions, App. B and D, disregarded AS 09. 10.040 (Judgment 10 Year Statute of Limitations), App. A-19, and rendered the question of disputed $90,000 alimony

arrearages undecided and moot. The arrearages were a genuine material issue and fact for trial by jury. These arrearages represent Petitioner's livelihood; they were unenforcable in the state courts and accumulated in Respondent's favor by undue process of law in contradiction to any concept of equity. The arrearages are the partial cause of Petitioner's injuries and damages. The state courts condoned Respondent's malicious acts to withhold the money in defiance of two original judgments and decrees from two diverse states. These were life sustaining funds and the state court judges were unconcerned with Petitioner's state of health, or her state of poverty and wielded a power that created sub-human hardships. The state courts of Alaska were oblivious to their own criteria. Merrill v. Merrill, 368 P.2d 546 (1961); Hinchey v. Hinchey, 625 P.2d 297

(1981); Diggs v. Diggs, 663, P.2d 950 (1981); Ryfeul v. Ryfeul, 650 P.2d 369 (1982); Burrell v. Burrell, 696 P.2d 157 (1984); Bussell v. Bussell, 623 P.2d 1221 (1981).

It was in the District Court's power to question the divergence and inequitable rulings by the Alaska Supreme Court in this area of litigation.

The Court of Appeals disregarded Petitioner's citation of Sutton v. Leib, 342 US 407 (1952) when Justice Frankfurter held:

> "[A] determination by the court of appeals in a diversity case that plaintiff's claim for alimony had been compromised will be accepted by the Supreme Court." Note 14.

The Court of Appeals in total oblivion to equitable laws and rights, failed to consider the exhorbitant arrearages the doctor accumulated in his favor by clever manipulations, and/or whether

Petitioner might have been subjected to cruel and unusual punishment by the state court judges.

The Court of Appeals affirmed the District Court's Opinion that "domestic related" cases are a state law matter and held:

> "[M]oreover, federal courts generally abstain from deciding such cases even where domestic relations problems are involved only tangentially to other issues determinative of the case." Memorandum, Court of Appeals, App. "B", p. 3.

But see, McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir. 1985), Ackerman v. Ackerman, 676 F.2d 898 (2d Cir. 1982); Spindel v. Spindel, 283 F.2d 35 (E.D.N.Y. 1961); Sutton v. Leib, supra, Orr v. Orr, 440 US 268 (1978); Keating v. Keating, 542 F.2d 910 (4th Cir. 1976); Porter v. Wilson, 419 F.2d 254 (9th Cir. 1969); and many more cases decided by federal courts involving domestic related issues. Rapoport vs. Rapoport, 416 F.2d 41 (9th Cir.

1969), Note 1; Robinson v. Robinson, 523 F.S. 96 (3rd Cir. 1981); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980); Tarr v. Tarr, 391 F.S. 1053 (E.D.Tenn. 1974); Zimmermann v. Zimmermann, 395 F.S. 719 (E.D.Pa. 1975); Benett v. Benett, 682 F.2d 1039 (D.C.D.C. 1982). As the Court held in Benett:

> "Federal Courts have also agreed to enforce under Full Faith and Credit clause monetary obligations arising out of final state divorce decrees that are no longer subject to modification."

The Cole Court held:

> "Federal Courts should not, however, simply avoid all diversity cases having intra-family aspects."

Petitioner is denied access to the Alaska state courts under changed circumstances, and she alleges that she is discriminated against for ethnic reasons and remedy and relief denied her in the federal courts of Alaska. Ovama v.

California, supra; Hudson v. Palmer, ____ US _____, 104, S.Ct. 3194 (1984).

II

District Court Denied Petitioner To Plead The Equitable Estoppel Versus The Respondent's Pleading The Statute of Limitations Which Had Not Run.

The case at bar is a classic example of permitting a plaintiff to supplement or amend its complaint and plead the equitable estoppel because the Respondent, a physician, Colonel U.S. Army, benefitted unjustly by unconscionable state court proceedings, resulting in judgments and orders in violation of any concept of equitable rights, causing Petitioner irreparable injuries and damages. In such a case, for obvious reasons, the law should raise an equitable estoppel, and not permit the Respondent to plead the statute of limitations, a fortiori, when they have not even run. The Courts below must have realized from the record, though incom-

plete, that the elements of equitable estoppel had been met because of the Respondent's acts and conduct. See, Pomeroy "Equitable Estoppel - Elements," Par. 805, Sec. IX, p. 191 (1941 and 1945) Cit. App. A-16, 17. Petitioner, to her detriment, had relied on Respondent's promises, ab initio. The Ninth Circuit Court's liberal application of the equitable estoppel criteria in United States v. Lazy F. C. Rancy, 481 F.2d 985 (9th Cir. 1973), and in Cal. Pac. Bank v. Small Bus. Adm., 557 F.2d 218 (9th Cir. 1977) ("where justice and fair play require it," Id. at 224) and the affirmative misconduct of the Respondent should have been the basis for further inquiry by the District Judge on reversal and remand by the Court of Appeals. Portman v. United States, 674, F.2d 1155 (7th Cir. 1982), at 1169. The wrongful conduct of a Respondent/defendant "until the present," in

conjunction with a state court's condonment of such acts, not only threatened but worked a serious injustice. Respondent's interests and rights would not have been unduly damaged by the imposition of equitable estoppel. By an application of an equitable balance, the Courts below should have considered the undermining of important federal interests, the depletion of the public fisc, leaving Petitioner and similarily situated persons as a potential public burden.

CONCLUSION

The deprivations of Petitioner's procedural and substantive rights in the District Court action warranted remand and reversal by the Court of Appeals. FRCP 56. Harlow v. Fitzgerald, 457 US 800 (1982) at 816. Not to give Notice of Intention to a pro se plaintiff prior to rendering Summary Judgment is an abuse of discretion and contrary to the criteria

in the Ninth and other Circuits. Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984); Reese v. Sparks, 760 F.2d 64 (Fed. Cir. 1985).

In the interest of public policy and for the common weal, this case should be reversed and remanded to the Ninth Circuit Court of Appeals for further proceedings in the Alaska District Court with an opinion to estop any further state sponsored prejudice, invidious discrimination and abuse of petitioner and similarily situated persons.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated this 21st day of July, 1986, at Columbus, Ohio.

Irmgard M. Hardie

Irmgard Maria Hardie
Petitioner pro se
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CERTIFICATE OF SERVICE

I hereby certify that I am the Petitioner pro se in the case at bar and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to David Shimek, Esq., upon counsel for the Respondent required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following address:

David Shimek, Esq.
Attorney at Law
c/o Peabody & Shimek
726 Christensen Drive
Anchorage, Alaska 99501

Irmgard M. Hardie

Irmgard Maria Hardie

Date: July 21st, 1986

APPENDIX A

Constitution, Federal Statutes and Federal Rules of Civil Procedure Verbatim

CONSTITUTION

Art. III, Sec. 2(1)

The judicial power shall extend to all cases, in law and equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority; - to all cases affecting ambassadors, other public ministers, and consuls: - to all cases of admiralty and maritime jurisdictions: - to controversies between two or more states; - between citizens of different states; - between citizens of the same state claiming lands under the grants of different states, and between a state, or citizens thereof, and foreign states, citizens or subjects.

Valley Forge Christian College v. Americans United for Sep. of Church and State, Inc., 454 US 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

Walters v. Nat. Assn. of Radiation Survivors, 473 US _____, 105 S.Ct. _____, 87 L.Ed.2d 220, 251 (1985).

Amendment VII (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Simler v. Conner, 372 US 221, 222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963).

Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 US 525, 78 S.Ct. 893, 2 L.Ed. 953 (1958).

Kelly Drye & Warren v. Murray Industries, Inc., 623 F.S. 522 (D.C.N.J. 1985).

Amendment XIV (1868)

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Brinkerhoff-Farris Co., v. Hill, 281 US 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930).

Hudson v. Palmer, _____ US _____, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984).

FEDERAL STATUTES

28 USC 1254(1)
Court of Appeals; Certiorari; Appeal: Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(1) By writ of certiorari granted upon the petition of any party to any civil or

criminal case, before or after rendition of judgment or decree;

Walters v. Nat. Assn. of Radiation Survivors, 473 US _____, 105 S.Ct. _____, 87 L.Ed. 220, 251, footnote 27, at 251 (1985).

28 USC 1291
Final Decisions of District Courts

The Courts of Appeal (other than the United States Court of Appeals for the Federal Circuit) shall have Jurisdiction of appeals from all decisions of the district courts of the United States.

Ackerman v. Ackerman, 676 F.2d 898 (2d Cir. 1982).

28 USC 1294(1)
Circuits in Which Decisions Reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

(1) from a district court of the United States to the court of appeals for the circuit embracing the district.

Cit. Hardin v. White Mt. Apache Tribe, 779 F.2d 476 (9th Cir. 1985).

28 USC 1331
Federal Question: Amount in Controversy; Costs

(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arise under the Constitution, Laws and Treaties of the United States.

Robinson v. Robinson, 523 F.S. 96 (3rd Cir. 1981).

28 USC 1332
Diversity of Citizenship; Amount in Controversy, Costs

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interests and costs, and is between --

(1) Citizens of different states;

McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir. 1985).

28 USC 1391
Venue Generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the jurisdiction, district where all plaintiffs or all defendants reside, or in which the claim arose;

(b) A civil action wherein jurisdiction is not founded solely on diversity citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law.

Zimmermann v. Zimmermann, 395 F.S. 719, E.D.Pa. (1975).

28 USC 1343
Civil Rights and Elective Franchise

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any rights or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any act of

Congress providing for the protection of Civil Rights, including the right to vote.

Lynch v. Household Finance Corp., 405 US 538, 542, 543, 92 S.Ct. 1113, 1117, 31 L.Ed.2d 242 (1972).

42 USC 1983
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United Staets or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Parratt v. Taylor, 451 US 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

42 USC 1985
Depriving Persons of Rights and Privileges

(2) Or, if two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any state or territory, with intent to deny to any citizen the equal protection of the law, or to injure him or his property for lawfully enforcing, or attempting to enforce, the rights of any person to the equal protection of the laws.

(3) If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner.

Griffin v. Breckenridge, 403 US 88, 105, 91 S.Ct. 1790, 29 L.Ed.2d 388 (1971).

28 USC 1738
State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

The acts of the legislatures and any state, territory, or possessions of the United States, or copies thereof, shall be authenticated by affixing the seal of such state, territory or possession thereto.

The records and judicial proceedings of any court of any such state, territory or possession, or copies thereof, shall be proved and admitted in other courts within the United States and its territories and possessions by attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a

judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territories or possessions from which they are taken.

Regents of University of Michigan v. Ewing, _____ US _____, 106 S.Ct. 507, 511, 88 L.Ed.2d 523 (1985).

28 USC 2072
Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, motions, and the practice and procedure of the District Courts and Courts of Appeals of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after

such rules have taken effect. Nothing in this title, anthing therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Daily Income Fund, Inc. v. Fox, 464 US 523, 544, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984).

28 USC 2403(b)
Intervention by United States or a State; Constitutional Question

(b) In any action, suit, or proceeding in a court of the United States to which a state or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that state affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the state, and shall permit the state to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The state shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the questions of constitutionality.

Verlinden B.V. v. Central Bank of Nigeria, 461 US 480, 76 L.Ed.2d 81, 103 S.Ct. 1962 (1983).

Rule 12(b)(1)

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in responsive pleading thereto if one is required, except that the following defenses may at the opinion of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a response pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on motion asserting the defense numbering (6) to dismiss for failure of a pleading to stage a claim upon which relief can be granted, matters outside the pleading shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(b)(1)

Ackerman v. Ackerman, 517 F.S. 614 (S.D. N.Y. 1981).

Spindel v. Spindel, 283 F.2d 35 (E.D.N.Y.) 1961.

Bennett v. Bennett, 682 F.2d 1039 (D.C. D.C. 1982).

Rule 56

(c) Motion and Proceedings Thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Harlow v. Fitzgerald, 457 US 800, 102 S. Ct.2727, 73 L.Ed.2d 396 (1982) at 816.

Rule 56

(d) Case Not Fully Adjudicated On Motion

If on motion under this rule judgment is not rendered upon the whole case or for

all the relief asked and a trial necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Amos v. Corp. of Presiding Bishop of Church, 618 F.S.1013 (D.C. Utah, 1985) at 1017.

Friedlaender v. Barnes, 622 F.S. 630 (S.D. N.Y. 1985) at 632.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidvits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions. When a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere

allegations or denials in his pleadings, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts, showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (1985).

Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984).

Bates v. Carborundum Co., 623 F.S. 613 (D.C.Ind. 1985).

(f) When Affidavits Are Unavailable

Should it appear from affidavits of a party opposing the motions, that he cannot for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. British Airways Board v. Boeing Co., 585 F.2d 946, 950-51 (9th Cir. (1978), accord G. C. Frey Ready-Mixed Concrete v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977), Program Engineering v. Triangle Publications, 634 F.2d 1188 (1980 9th Cir.) notes 9, 10.

Rule 56

(g) Affidavits Made in Bad Faith

Should it appear to the satisfaction of the court at any time that any of the

affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees and any offending party may be adjudged guilty of contempt.

Marek v. Chesny, _____ US _____, _____ S.Ct. _____, 87 L.Ed. 2d 1, at 16, footnote 11 (1986).

RESTATEMENT OF JUDGMENTS

Par. 86, Ch. 6 (1982)

Comment (e)

Excerpt

On the other hand, the subject of attack in federal court may be a state adjudicatory proceeding itself. In such a situation, the underlying problem is whether the state proceeding comports with federal procedural standards and thus is entitled to the recognition accorded a judgment. If the purported adjudication does not meet those standards, the decision resulting from it may not be preclusive in the subsequent federal action.

Robinson v. Arivoshi, 441 F.S. 580 (D.C. Hawaii, 1977).

Brinkerhoff-Faris Co. v. Hill, 281 US 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930).

Par. 26, Ch. 3 (1982)

(1) When any of the following circumstances exists, the general rule of Par. 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant.

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief;

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme or it is the sense of the scheme that the plaintiff should be permitted to split his claim.

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disppsition of the controversy.

Stanley v. Missouri State Board of Law Examiners, 616 F.S. 142 (D.C. Mo. 1985).

Supreme Court of New Hampshire v. Piper, US , 105 S.Ct. 1272, 84 L. Ed.2d 205 (1985), cf. to Alaska Statute 25.24.100, page this App. A-18.

POMEROY "EQUITABLE ESTOPPEL - ELEMENTS"

Par. 805, Sec. IX, 1941, 1945

805. Generally - In conformity with the principle already stated (Par. 803) which lies at the basis of the doctrine and upon the authority of decisions which have recognized and adopted that principle, the following are the essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications. One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case, without examining the instances in which they have been modified or limited. (1) There must be conduct - acts, language, or silence - amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be acted

upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. It will be seen that fraud is not given as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision should be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as always essential would at once strike out some of the most familiar and best established instances of equitable estoppel***

TRW, Inc. v. Federal Trade Com., 647 F.2d 942 (9th Cir. 1981).

Investors Research Corp. v. Securities and Exch. Com., 628 F.2d 168, 174 n. 34 (D.C. Cir., 1980), cert. denied, 449 US 919, 101 S.Ct. 317, 66 L.Ed.2d 146 (1980).

ALASKA STATE STATUTES

AS 25.24.100

Residency Requirement of Military Personnel

A person serving in a military branch of the United States government who has been continuously stationed in a military base or installation in the state for a period of one year shall be deemed a resident in good faith of the state for purposes of AS 25.24.010 - 25.24.180 (para. 12.09, ch. 101, SLA 1962) (domestic relations, divorce, custody, property settlement, inter alia).

Comment: This statute permits dual citizenship for civil suits.

Lauterbach v. Lauterbach, 392 P.2d 24 (1964).

AS 25.24.160

Armed Forces Retired Pay

[I]s not property which is divisible upon divorce but is future income to the retiree.

Cose v. Cose, 592 P.2d 1230 (1979), cert. denied, 453 US 922, 101 S.Ct. 2149, 69 L.Ed.2d 1003 (1981).

AS 09.25.010

Statute of Frauds

(a) In the following cases and under the following conditions, an agreement, promise, or undertaking is unenforceable

unless it or some note or memorandum of it is in writing and subscribed by the party charged or by an agent of that party:

(1) an agreement that by its terms is not to be performed within a year from making of it.

(2) an agreement, the performance of which is not to be complete by the end of a lifetime, this provision includes a contract to bequeath property or make a testamentary disposition of any kind, a contract to assign or an assignment, with or without consideration to the promisee.

Bell v. Cascaden, 6 Alaska 35 (1918), aff'd. 257 F.926 (9th Cir. 1919).

Jackson v. White, 556 P.2d 530 (AK Supreme Court, 1976).

AS 09.10.040

Action upon Judgments or Sealed Instruments in 10 Years (Statute of Limitations

No person may bring an action upon a judgment or decree of a court of the United States, or of a state or territory within the United States, and no action may be brought upon a sealed instrument (judgment) unless commenced within 10 years. (Para. 1.04, ch. 101, SLA, 1962).

Vockner v. Erickson, 712 P.2d 379 (AK Supreme Court, 1986).

AS 09.10.050

Action To Be Brought in Six Years

No person may bring an action (1) upon a contract or liability, express or implied, excepting those mentioned in AS 09.10.040 or 09.10.055; (2) for waste or trespass upon real property; or (3) for taking, detaining, or injuring personal property, including an action for its specific recovery, except those mentioned in AS 09.10.055; unless commenced within six years. Par. 105, ch. 101, SLA, 1962; Par. 1, ch. 61, SLA, 1967:

"Unless note or circumstances show it was not immediately due. The rule that paper payable on demand is due immediately may not apply where there is something on the paper, or in the circumstances under which is it given, to show that it was not the intention that it should become due immediately.

North American Trading and Transp. Co. v. Byrne, 4 Alaska 26 (1910).

AS 09.10.070

Action To Be Brought in Two Years

No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. Par.

1.07, ch. 101, SLA, 1962, p. 27. "The Statute of Limitations as to torts, 09. 10.070, does not usually begin to run until the tort is complete."

Austin v. Fulton Ins. Co., 444 P.2d 536 (1968), Greater Area Inc. v. Bookman, 657 P.2d 828, 830 (1982).

When Tort Complete

"A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff."

Austin v. Fulton Ins. Co., 444 P.2d 536 (1968).

APPENDIX B

COPY

FILED
Feb 4, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRMGARD M. HARDIE, Plaintiff-Appellant,	)	No. 84-4050
vs.	)	DC No. CV A83-306 JMF
PHILIP W. HARDIE, JR., Defendant-Appellee.	)	MEMORANDUM*

Appeal from the United States
District Court for the
District of Alaska
James M. Fitzgerald, District Judge,
Presiding

Submitted May 23, 1985**

Before: WALLACE, SKOPIL, and FLETCHER,
Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

**The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R. App. P. 34(a), Ninth Circuit Rule 3(f).

Irmgard Hardie appeals the district court's grant of summary judgment in a pro se diversity action brought against Philip Hardie, her former husband. Irmgard contends the district court erred by concluding that (1) it was precluded from ruling on any of Irmgard's claims previously addressed by the Alaska state courts; (2) it lacked jurisdiction over Irmgard's domestic relations claims; and 93) Irmgard's tort, civil rights, and contract claims were time-barred. We affirm.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983).

MERITS

1. Preclusion.

The district court correctly determined that the federal full faith and credit statute barred reevaluation of

claims previously addressed by the state courts. 28 U.S.C. § 1738 (1982); see Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 896 (1984) (federal court must give state-court judgment same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered).

2. Domestic Relations.

To the extent that Irmgard's complaint challenged the validity of the divorce decree and alleged claims for alimony arrears, desertion, and harassment, the district court correctly granted summary judgment. Domestic relations is generally considered a state law matter. Federal courts have no jurisdiction to grant divorces, determine support payments, or award child custody. Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983). Moreover, federal courts generally abstain from deciding such cases even where domestic

relations problems are involved only tangentially to other issues determinative of the case. Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir. 1982). Tort allegations do not provide a means for circumventing this limitation to federal court jurisdiction. Id. at 138.

3. Statute of Limitations.

The district court correctly concluded that all of Irmgard's remaining claims were time-barred by the applicable limitations periods. Irmgard's complaint was filed on June 14, 1983. Her tort claims arose prior to June 14, 1981 and were therefore barred by Alaska's two-year limitations period. See Alaska Stat. § 09.10.070 (1984). Irmgard's contention that the two-year limitations period did not begin to run until she realized the full extent of the damages is without merit. Irmgard did not allege that she was unaware of Philip's allegedly tortious

actions when he committed them. See Sharrow v. Archer, 658 P.2d 1331, 1334 (Alaska 1983) (statute of limitations period begins to run from time plaintiff was or should have been aware of the facts supporting the claim for relief). Irmgard's civil rights claims are similarly barred by the two-year limitations period, see Alaska Stat. § 09.10.070, as are her contractual claims which arose prior to Alaska's six-year limitations period for contractual claims accruing on June 14, 1977. See Alaska Stat. § 09.10.050; see also King v. First National Bank of Fairbanks, 647 P.2d 596, 601 (Alaska 1982) (cause of action for breach of contract accrues when promisor defaults, and limitations period begins to run at that time).

AFFIRMED.

APPENDIX C

COPY

FILED
May 9, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRMGARD M. HARDIE, Appellant,	)	No. 84-4050
v.	)	DC No. CV A83-306 JMF
PHILIP W. HARDIE, JR., Appellee.	)	ORDER

Appeal from the United States District Court for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Before: WALLACE, SKOPIL, and FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

JUDGMENT

COPY FILED Jun 9, 1986 United States District Court Cistrict of Alaska By_____Deputy	A TRUE COPY ATTEST Jun 3, 1986 CLERK OF COURT By: /s/ Deputy Clerk This certification constitutes the mandate of the Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRMGARD M. HARDIE, Plaintiff-Appellant, vs. PHILIP W. AHRDIE, JR., Defendant-Appellee.	)	No. 84-4050 A83-306 JMF

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ANCHORAGE District of ALASKA, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and Entered: February 4, 1986

cc:
Hardie
David Shimek
Judge Fitzgerald

APPENDIX D

COPY

FILED
Jul 18, 1984
United States District Court
District of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

IRMGARD M. HARDIE, Plaintiff,	)	
v.	)	No. A83-306 Civil
PHILIP W. HARDIE, Defendant.	)	MEMORANDUM DECISION AND ORDER

Plaintiff Irmgard Hardie brought this action against her former husband, Phliip Hardie, based upon claims arising out of their marriage, their divorce in 1972, their child custody dispute, their property settlement, and the protracted Alaska State Court litigation surrounding and following their divorce. See Plaintiff's Proposed Amended Complaint, January 31, 1984. The plaintiff originally brought her action on June 14, 1983, and on January 31, 1984,

moved to amend her complaint to add several new claims. Plaintiff's Original Complaint, June 14, 1983; Plaintiff's Proposed Amended Complaint, January 31, 1984. The defendant moved to dismiss this action on December 2, 1983, and in support of his motion, on April 30, 1984, he submitted a set of court documents and decisions that have been issued during prior state and federal litigation between the parties. Defendant's Motion to Dismiss, December 2, 1983; Defendant's Supplemental Memorandum In Support of Motion to Dismiss, April 30, 1984. Therefore, I deem the defendant's motion to be one for summary judgment under Federal Rule of Civil Procedure 56. Fed. R. Civ. P. 12(b). I have carefully examined all the claims raised in the plaintiff's original complaint and proposed amended complaint, and have reviewed all the other pleadings and documents in this action, and I now GRANT

the defendant's motion for summary judgment.

The plaintiff's claims against her former husband fall into two distinct categories: those which have been previously addressed by the Alaska State Courts, and those which have not. In her present action, the plaintiff seeks to collaterally challenge portions of the prior Alaska State Court decisions granting her divorce and establishing and subsequently revising her property and custody settlement with the defendant. See, e.g., Plaintiff's Proposed Amended Complaint, pp. 7-15. She is challenging the rulings in at least twelve prior state court decisions, ranging from her original divorce decree in 1972 to the Alaska Supreme Court's denial of her application for relief on June 21, 1983. Id.; see also Defendant's Supplemental Memorandum and attached exhibits. Under the Federal

Full Faith and Credit Statute, 28 U.S.C. §1738, I am precluded from reevaluating or overturning any of these prior state court decisions. 28 U.S.C. §1738; Migra v. Warren City School District Board of Education, _____ U.S. _____ 104 S.Ct. 892, 896 (1984); Kremer v. Chemical Construction Corporation, 456 U.S. 461, 466 (1982); Allen v. McCurry, 449 U.S. 90, 96 (1980); Calhoun v. Greening, 636 P.2d 69, 71-72 (Ak. 1981). Therefore, I must grant summary judgment on all claims previously addressed by the Alaska State Courts.

Moreover, I now conclude that I must also grant summary judgment on all the plaintiff's claims which have not been previously litigated. This is so since the remaining claims would require this court to determine the amount of support payments or to resolve child custody issues over which I have no subject matter jurisdiction.[1] Peterson v. Babbitt, 708

F.2d 465, 466 (9th cir. 1983); Csibi v. Fustos, 670 F.2d 134, 136-138 (9th Cir. 1982); Buechold v. Ortiz, 401 F.2d 371, 372-373 (9th cir. 1968). Furthermore, all these remaining claims are barred by the applicable Alaska statutes of limitation. The remaining tort claims alleged in her original and proposed amended complaints all arose prior to June 14, 1981, and are thus barred by Alaska's two-year statute of limitations for tort claims, AS 09.10.070.[2] See AS 09.10.070. The remaining contractual claims she has alleged all arose prior to June 14, 1977, and are thus barred by Alaska's six-year statute of limitations for contractual claims, AS 09.10.050.[3] See AS 09.10.050.

I do not accept the plaintiff's claim that the two-year period of limitations on her tort claims against the defendant did not begin to run until she realized the full extent of the damage that his alleged

actions had caused her. See Plaintiff's Proposed Amended Complaint, p. 6. The plaintiff does not contend that she was unaware of any of the defendant's allegedly tortious actions at the time he committed them. Therefore, the two-year period of limitations on the plaintiff's tort claims began to run at the time the defendant committed the allegedly tortious acts. Van Horn Lodge, Inc. v. White, 627 P.2d 641, 644 (Ak. 1981); Sharrow Archer, 658 P.2d 1331 1333-1335 (Ak. 1983). As these occurred prior to June 14, 1981, the plaintiff's remaining tort claims are barred under AS 09.10.070.

Nor do I accept the plaintiff's contention that the statute of limitations on her contractual claims is tolled by each support payment made by the defendant to her and her son, since, as she claims, each of these payments is insufficient to meet the obligations undertaken by the

defendant in 1970. See Plaintiff's Proposed Amended Complaint, pp. 5-6. As noted above, the size of these support payments has already been determined by the Alaska state courts and it cannot be collaterally challenged in this action. See Migra v. Warren City School District Board of Education, 104 s.Ct. at 896. Since the plaintiff's remaining contractual claims all accrued prior to June 14, 1977, they are barred under AS 09.10.050. See King v. First National Bank of Fairbanks, 647 P.2d 596, 601 (Ak. 1982). Horwarth v. First national Bank of Anchorage, 540 P.2d 486, 490-491 (Ak. 1975).

The plaintiff's civil rights claims against the defendant under 42 U.S.C. §1983 and §1985 are also barred under the applicable statute of limitations -- in this case, AS 09.10.070.[4] See Wrighter v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1353 (9th Cir. 1984); Major v. Arizona State Prison,

642 F.2d 311, 312 & n. 2 (9th Cir. 1981); see also AS 09.10.070. Moreover, in light of the state court documents and decisions that have been submitted by the defendant, and because the plaintiff has failed to provide any evidence to support her claims of a conspiracy to deny her due process rights, I must grant summary judgment on the plaintiff's claims under §1983. See Defendant's Supplemental Memorandum and attached exhibits; Fed. R. Civ. P. 56(e). The plaintiff has failed to produce any facts to indicate that there was "an agreement, or 'meeting of the minds' to violate [her] constitutional rights" between the defendant and various state court judges or state social workers. See Fonda v. Gray, 707 F.2d 435, 438-439 (9th Cir. 1983); Ward v. Equal Employment Opportunity Commission, 719 F.2d 311, 314 (9th Cir. 1983). Finally, the plaintiff cannot maintain a claim under §1985 against the

defendant, because she is not claiming that his actions were motivated by "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" Kush v. Rutledge, U.S. _____, 103 S. Ct. _____ 1483, 1487-1488 (1983); accord, Mollnow v. Carlton, 716 F.2d 627, 628 (9th Cir. 1983).

For these reasons, I grant the defendant's motion for summary judgment on all the plaintiff's claims.

ORDERED ACCORDINGLY,

DATED at Anchorage, Alaska, this 18 day of July, 1984.

/s/
United States District Judge

cc: Hardie
Cowper

FOOTNOTES

1. In ruling on this summary judgment motion, I have concluded that the following claims in the plaintiff's Proposed

Amended Complaint, relating to the amount of support payments which the defendant allegedly should have made to the plaintiff and her son, are outside this court's subject matter jurisdiction:¶¶II-8, II-10, II-14, and XI-6.

2. For purposes of this summary judgment motion, I have treated the following claims in the plaintiff's Proposed Amended Complaint as raising tort claims against the defendant: ¶¶II-1, II-2, II-5, II-6, II-7, II-9, II-10, II-11, II-13, II-16, II-17, II-18, III-1, III-2, III-3, III-4, III-6, IX-1, IX-4, X-1, X-2, X-3, X-5, X-9, X-12, X-15, X-17, X-18, X-19, X-23, X-24, X-24, X-26, X-29, X-30, X-31, XI-7, and p. 22-2.

3. For purposes of this summary judgment motion, I have treated the following claims in the plaintiff's Proposed Amended Complaint as raising contractual claims against the defendant: ¶¶II-2, II-3, II-4,

II-12, II-13, III-1, III-5, X-10, X-11, X-13, X-14, X-16, X-21, XI-1, XI-2, XI-3, XI-4, XI-5, XI-8, XI-9, and p. 23-6.

4. For purposes of this summary judgment motion, I have treated the following claims in the plaintiff's Proposed Amended Complaint as raising civil rights claims against the defendant: ¶¶II-15, IX-1, IX-2, IX-6, IX-7, IX-15, IX-17, IX-22, IX-24, IX-26, X-9, and X-12.

COPY

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT OF ALASKA	
IRMGARD M. HARDIE, Plaintiff, v. PHILIP W. HARDIE, Defendant.	DOCKET NUMBER A83-306 CIV NAME OF JUDGE James M. Fitzgerald

/ / Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

==========

/x/ Decision by Court. This action came on for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT defendant's motion for summary judgment on all the plaintiff's claims is GRANTED.

APPROVED:

James M. Fitzgerald
Chief Judge, U.S. District Court

Clerk: JoAnn Myres
By: Deputy Clerk:
/s/ Sue Shaffer

Date:
July 18, 1984

cc: Hardie
Cowper

COPY

APPENDIX E

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Attorneys at Law
909 West Ninth Avenue,
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Anchorage, Alaska 99501

E. J. Fyfe (987) 274-1060
G. R. Eschbacher

July 12, 1976

Mrs. Irmgard Hardie
24, Aschbachbichl
Kitzbuhel, Austria

Dear Mrs. Hardie:

It has come to my attention through various phone calls and letters from you to myself, my wife, my partner and to the secretaries in our office, that you have lost confidence in me. I feel the reason for your loss of confidence is misplaced. Only this office confirmed the whereabouts of Bruce and arranged to have Bruce go to Austria for an extended visit with you.

In the course of representing you, I have been harrassed and pressured by court personnel, city police, psychiatrists, opposing counsel and numerous other people. Frankly, I feel we have been quite successful.

This office is prepared to file a motion for costs and attorney fees in Fairbanks. However, since you have lost confidence in me the matter will be handled by my partner, Mr. Fyfe.

Mr. Fyfe informs me that it will be necessary for you to forward $1,000.00 to this office for the prosecution of the motion. Please address all correspondence and phone calls in the future to Mr. Fyfe.

I trust you and Bruce are enjoying a pleasant summer. My best regards to Bruce -- as well as yourself.

Yours sincerely,

FYFE & ESCHBACHER

/s/

G. R. Eschbacher